



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2004

Mr. William T. Buida
Deputy General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-6490

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206319.

The Texas Department of Human Services (the "department") received a request for information concerning department operations, administration and personnel, as well as information regarding the operation of several department programs. You indicate that the department does not possess some of the information requested. A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). However, the Public Information Act (the "Act") generally does not require a governmental body to obtain information not in its possession or create new information in response to an open records request. See Open Records Decision Nos. 599 (1992), 534 (1989). You indicate that the department will release a portion of the information requested in item 13 to the requestor. We also note that you only raise exceptions to disclosure for information responsive to item 12 and the remainder of the information requested in item 13. Thus, we understand you to represent that the remaining responsive information, to the extent it exists in the possession of DHS, has been released to the requestor. If not, the department must release it immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, with respect to your claim under section 552.101 of the Government Code we note, and you acknowledge, that the department has not raised this exception within the ten

business day time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(a), (b). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *Hancock*, 797 S.W.2d at 381-82. Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. You state that the information contained on the CD-R submitted as responsive to item 12 (the “item 12 disc”) “may include names and phone numbers of applicants and recipients in [department] programs.” Sections 12.003 and 21.012 of the Human Resources Code prohibit the disclosure of information concerning clients of a state plan for assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 40 T.A.C. § 71.4 (information may be released if it is for purposes reasonably necessary for administering assistance program); Open Records Decision Nos. 584 (1991), 166 (1977).

Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). The term “assistance” in sections 12.003 and 21.012 of the Human Resources Code includes “all forms of assistance and services for needy persons authorized by Subtitle C.” Hum. Res. Code § 11.001(4); *see also id.* § 31.001 *et seq.* (subtitle C, pertaining to assistance programs).

In Open Records Decision No. 584 (1991), this office determined that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range

of individual client information, and not merely the clients' names and addresses." *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See also* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

We understand you to represent that the item 12 disc contains information pertaining to individual clients receiving Temporary Assistance for Needy Families ("TANF"), food stamp assistance, or Medicaid benefits. We find that release of such information in this instance is not a release "for purposes directly connected with the administration of the department's assistance programs." *See* 40 T.A.C. §§ 71.4, 71.11-71.14; *see also* 42 C.F.R. § 431.302 (setting forth purposes directly related to state Medicaid and Medicare administration); 7 C.F.R. § 272.1(c) (use or disclosure of information obtained from food stamp applicant or recipient households is restricted to persons specifically listed herein); 45 C.F.R. § 205.50 (limits the use or disclosure of information concerning applicants and recipients of assistance under a state plan for financial assistance under title IV-A of the Social Security Act). Thus, we determine that the department must withhold specific information pertaining to individual clients from the item 12 disc pursuant to section 552.101 of the Government Code as information made confidential by law.

Next, you contend that the submitted documents and CD-R discs submitted as responsive to item 13 (the "item 13 information") are excepted under section 552.103 of the Government Code. We note that a portion of this information is subject to section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The folder "Public RecordsIV&V_Monthly" on the CD-R marked "#13A" contains Independent Verification and Validation Monthly Status Reports. We find that these reports are completed reports made for or by the department that are subject to section 552.022(a)(1). Therefore, as prescribed by section 552.022, the department must release this information unless it is confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also*

Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not withhold this portion of the item 13 information under section 552.103. As you raise no other exception to disclosure for this information, we determine that the department must release the files in the folder "Public RecordsIV&V_Monthly" on the CD-R marked "#13A" to the requestor.

We next consider your claim under section 552.103 with respect to the remaining item 13 information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Item 13 of the request seeks eight categories of information regarding the Texas Integrated Eligibility Redesign System ("TIERS"), including information concerning the functionality and "outstanding defects" of the TIERS application. You advise that officers of the department, in their official capacities, are currently defendants in a pending lawsuit filed by plaintiffs who allege the department wrongfully denied TANF, food stamp assistance, and Medicaid benefits to the plaintiffs due to problems with the TIERS application. You have submitted a copy of the Plaintiffs' First Amended Complaint in cause number A-03-CA-916-LY, filed December 12, 2003 in the United States District Court for the Western District of Texas, Austin Division. Based on your representations and our review of the submitted information, we find you have established that the department was

a party to pending litigation on the date the department received the present request, and that the item 13 information is related to the litigation. We therefore determine that the department may withhold the remaining item 13 information at this time pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending lawsuit is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must withhold specific information pertaining to individual clients of department assistance programs from the item 12 disc pursuant to section 552.101 of the Government Code as information made confidential by law. The department must release the remaining information on the item 12 disc to the requestor. The Independent Verification and Validation Monthly Status Reports in the folder "Public RecordsIV&V_Monthly" on the CD-R marked "#13A" must be released in accordance with section 552.022(a)(1) of the Government Code. The remainder of the submitted item 13 information is excepted from disclosure under section 552.103 of the Government Code and may be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 206319

Enc: Submitted documents

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